

97 FEOR 3012

**Sherlyn E. W. Owens v. Pena, Secretary,
Department of Transportation, Federal
Aviation Authority
Equal Employment Opportunity
Commission
EEOC 05940824
September 5, 1996**

Related Index Numbers

**31.0961 Sex Discrimination, Sexual Harassment,
By Co-Worker**

**31.0967 Sex Discrimination, Sexual Harassment,
Employer Liability**

**31.0975 Sex Discrimination, Sexual Harassment,
Non-Sexual Harassment**

**43.0609 Remedies, Personnel Actions, Leaves of
Absence**

Case Summary

The agency failed to respond appropriately to the appellant's claims that two co-workers subjected her to sex-based harassment when they daily treated her in a rude, demeaning and threatening manner. The appellant was entitled to reimbursement for the leave she took as a result of the harassment.

The agency failed to react appropriately to the appellant's claims of sex-based harassment. The appellant filed a formal complaint alleging that she was subjected to sexual harassment and sex-based harassment by co-workers who engaged in ongoing rude, distasteful and abusive behavior. She further alleged that one of her co-workers brought a loaded weapon to work, causing her to fear for her personal safety. She asserted that she complained to superiors, who initially acknowledged the improper conduct, but later denied and condoned it. The appellant also claimed that she was subjected to retaliation when her leave requests were denied and when she was placed in an absence without leave status after she was unable to return to work due to illness caused by the harassment. The agency issued a final decision finding no discrimination. The Commission affirmed

on appeal, concluding that the incidents alleged by the appellant were not severe or pervasive enough to establish a case of hostile work environment sexual harassment. However, the Commission granted the appellant's subsequent request for reconsideration and thereafter reversed its previous decision. The Commission initially noted that its previous decision improperly analyzed the appellant's claims only on the basis of sexual harassment, when the majority of her claims actually alleged sex-based harassment. The Commission went on to conclude that two co-workers did harass the appellant on the basis of her sex when they subjected her to demeaning, sexist, rude and threatening comments and behavior. Finally, the Commission found that the agency could not avoid liability for the co-workers' conduct because appellant made agency officials aware of the harassment, but they did not treat her complaints seriously and failed to take appropriate remedial action. As a partial remedy, the Commission directed the agency to reimburse the appellant for all leave taken as a result of the harassment and to expunge its records of any mention of her placement in AWOL status. Although the appellant had since been removed, the Commission noted that her removal was the subject of another complaint and directed the agency to ensure she is not required to work with the offending individuals if she wins reinstatement. Because the harassment occurred prior to the enactment of the Civil Rights Act of 1991, she was not entitled to compensatory damages.

Full Text

Granting of Request to Reconsider

On July 21, 1994, Sherlyn E. W. Owens (hereinafter referred to as appellant) timely initiated a request to the Equal Employment Opportunity Commission (EEOC or Commission) to reconsider the decision in *Sherlyn E. W. Owens v. Federico F. Pena, Secretary, Department of Transportation, (Federal Aviation Authority)*, EEOC Appeal No. 01932927 (June 16, 1994) [94 FEOR 3475] received on June 21, 1994. EEOC regulations applicable to the instant case provide that the Commissioners may, in

their discretion, reconsider any previous decision. 29 C.F.R. § 1614.407(a). The party requesting reconsideration must submit written argument or evidence that tends to establish one or more of the three criteria prescribed by 29 C.F.R. § 1614.407(c): 29 C.F.R. § 1614.407(c)(i) (new and material evidence is available that was not readily available when the previous decision was issued), 29 C.F.R. § 1614.407 (c) (2) (the previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy), and 29 C.F.R. § 1614.407 (c) (3) (the decision is of such exceptional nature as to have substantial precedential implications). Appellant brings her request under 29 C.F.R. § 1614.407 (c) (2) For the reasons set forth herein, appellant's request is GRANTED.

Issue Presented

The issue presented herein is whether the prior appellate decision correctly determined that appellant was not subjected to sexual harassment when she was allegedly subjected to unwelcome sexual conduct that unreasonably interfered with her performance and created an intimidating, hostile and offensive working environment.

Background

On July 23, 1990, appellant filed a formal EEO complaint alleging that she was subjected to ongoing sexual harassment and harassment based on her sex in what she characterized as an "unhealthy and unsafe" work environment. Specifically, appellant alleged that Aviation Safety Inspectors at the agency's Jacksonville, Florida, Flight Standards Office subjected her to sex-based rude and volatile behavior, disparate and abusive treatment, distasteful jokes, and discrimination. She claimed that one of these coworkers brought a loaded firearm into her work environment, causing her to fear for her personal safety. She asserted that when she complained about the harassment, it was initially acknowledged, but later downplayed, denied and condoned by management, who retaliated against her by denying her leave requests and by placing her in an absence without leave (AWOL) status when she was unable to

return to the work environment due to harassment related illness. As relief for her complaint, appellant requested, *inter alia*, that she be removed from AWOL status, be given back pay with benefits and continuation of pay until her complaint is resolved as well as a lump sum settlement, and that appropriate disciplinary action be taken against the alleged harassers and certain members of agency management.

The agency accepted appellant's complaint for investigation, characterizing the issue as: "Complainant alleges that between May 18, 1990 and July 23, 1990, she was subjected to unwelcome sexual conduct that unreasonably interfered with her performance and created an intimidating, hostile, and offensive working environment at the Jacksonville Flight Standards District Office." On August 11, 1992, after an investigation and an unsuccessful informal adjustment attempt, the agency issued a notice of proposed disposition finding no discrimination. Appellant initially requested an administrative hearing, but later withdrew this request. Thereafter, the agency issued a final agency decision (FAD), finding no discrimination. Appellant appealed this decision to the Commission. On appeal, appellant claimed that she was targeted with unwelcome harassing sexual and sexist comments by male employees who had sexist attitudes, that the harassment was severe enough to alter the conditions of employment and create a hostile work environment, that her predecessor indicated that she was similarly harassed in her statement, and that her employer refused to take proper remedial action. She asserted that the agency failed to consider supporting documentation she had submitted during the investigation, including the statement of the previous incumbent in her position, who indicated that she had been subjected to similar harassment. Appellant asserted that she was unable to work in the negative hostile environment and had suffered physical and emotional damages as a result of which she has now been determined to be disabled by several federal agencies.

The previous decision analyzed appellant's allegations solely as allegations of sexual harassment. Specifically, the decision found that appellant appeared to be raising allegations of hostile work environment sexual harassment and found that the incidents raised by appellant were not severe or pervasive enough upon which to base a finding that appellant was subjected to hostile work environment sexual harassment. In doing so, the previous decision found the previous Aviation Clerk's statement in support of appellant's complaint only supported the conclusion that the former Aviation Clerk and the cited coworker had a personality conflict of some sort and did not alone establish that appellant was subjected to sexual harassment. The decision further found that the agency took action to correct the behavior of appellant's co-workers in that coworker I was advised that carrying a firearm on Federal property was an actionable offense for which he would be disciplined if he again brought a weapon into the office, an office-wide meeting was called by management to address the concerns of all involved, and a new policy was implemented in which appellant's work assignments were to be funneled through one individual in order to minimize appellant's contact with other co-workers.

The investigative report and correspondence file compiled in this case reflect the following additional pertinent facts.

At the time of the events alleged in appellant's complaint, the Jacksonville Flight Standards Division Office where appellant worked was comprised of three GS-13 level (coworkers 1, 2, and 3) and one GS-14 level (coworker 4) male Aviation Safety Inspectors and one GS-5 female Aviation Clerk (appellant). The supervisor of record for the Jacksonville office was the GM-15 Assistant Manager of the North Florida Geographic Section who was based in Orlando, Florida (the Assistant Manager). The next higher level Manager of the Flight Standards Division was based in Orlando, Florida (the Manager). The highest level Manager of the Flight Standards Division listed by the agency was based in

Atlanta, Georgia (the FAA Manager).

Appellant averred that she was subjected to verbally harassing conduct, sometimes several times a day from her male coworkers, beginning on the first day of her employment and continuing until she left the environment after June 18, 1990. Appellant averred that this conduct was perpetuated by both coworkers and managers.

As examples of the harassment to which appellant was allegedly subjected, she cited the following incidents. Appellant asserted that she witnessed an incident which occurred on May 18, 1990, during an on-site visit by the FAA Manager. Appellant alleged that during the visit, the FAA Manager's wife waited outside in the car for hours, and that during this time period, coworker 1 put his hand out for the FAA Manager to shake and commented that "it was nice to meet someone who knew how to keep a woman in her place."¹ Appellant asserted that coworker 2 stated on one occasion to the Assistant Manager who did nothing to correct him that "He had never seen a woman who could do anything as good as a man." She also claimed that on June 6, 1990, coworker 2 complained to her regarding the coldness of the office and then inquired as to whether she was going through menopause. Appellant further asserted that coworker 1 had on at least one occasion displayed a loaded 357 magnum handgun to her and others and that this caused her to feel physically threatened. She also cited an incident wherein coworker 1 allegedly stood over her and pointed his finger in her face in a threatening manner after she returned an inaccurately completed Time and Attendance form to him. She alleged that male coworkers yelled at her, frequently referred to her as their secretary, threw papers on her desk, and expected her to function in a subservient position to them by cleaning up after them, making their coffee, and baking them birthday cakes. She asserted that these employees frequently told distasteful jokes and were amused at her discomfort from them.² Appellant further alleged, without rebuttal, that on June 1, 1990, coworker 4 told her that if her position were filled by

a male, coworkers 1 and 2 would not similarly harass or engage in angry and abusive behavior toward that incumbent.

Appellant asserted that on numerous occasions she made the management supervisor who worked in the Orlando facility as an Assistant Manager, aware of the ongoing harassment of her by her male coworkers, but was told in a June 14, 1990 meeting with the Assistant Manager and coworker 4 that she should treat coworker 1 "like a child." Appellant claimed, without rebuttal, that in a later June 25, 1990 meeting, the Manager agreed with other agency management officials that the inspectors needed a "baby sitting" environment.

Appellant asserted that she requested, but was never granted, a temporary transfer and that it was instead suggested that she, and not coworker 1, request a permanent transfer. She claimed that the Assistant Manager denied the seriousness of the situation and acted instead to ostracize her, in a June 20, 1990 letter. In that letter, which is contained in the record, the Assistant Manager indicated that an office-wide meeting had been held, that coworker 1 was counseled concerning his actions in carrying a weapon to work and informed that if the practice occurred in the future, disciplinary action would be taken. He also stated in the letter that although they all agreed that all parties had participated in joke telling, "we agreed to discontinue distasteful joke telling or any other activity to which an individual may take offense." The letter stated that Inspectors were counseled individually on the subject. The letter further indicated that a new procedure had been implemented whereby any work required to be processed or typed would go through the senior inspector (coworker 4) who would be the only person in the office dealing directly with appellant.

The former Aviation Clerk averred that during her tenure she was subjected to verbal abuse, threatening behavior and sexual remarks from coworkers 1 and 2. She also submitted a detailed, over three page single spaced typewritten statement for the record which she specifically attested to in her

investigative affidavit. In this statement, she asserted that on the very first day of her employment at the Jacksonville office, coworker 1 told her that one of her assigned duties was to clean the coffee pot and make the coffee for the office. She indicated that during the same week coworker 1 asked her why she was not at home with some babies because she had been married so long. She indicated that he was rude and demanding in his dealings with her, asserting that she was incompetent and took longer to understand the work because she was of "the lower species." She asserted that "women being the lower species" was coworker 1's favorite saying.

The former Aviation Clerk also asserted that coworker 1 was always talking down women who came into the office, questioning with regard to a female agency security office employee, "how could they ever let a woman carry a gun" and wondering, with regard to a female pilot who came into the office, who she "slept with" to get her rating. She further asserted, in her affidavit, that coworker 1 told her that if she were his wife, "he would beat the s---t out of her." She indicated that after she informed the Assistant Manager, without success, that if the harassment did not stop she would file a sexual harassment complaint, she made a statement in one of the FAA surveys about being sexually harassed at the Jacksonville Office. She also asserted that on an occasion when she stopped speaking with the other members of the office because of her anger at the unresolved situation, she was asked by coworker 4 whether she had "PMS."

She indicated that the FAA Manager became upset with her for reporting the harassment in the FAA survey and for calling it sexual harassment when it was discrimination. She indicated that during the time period that a particular supervisor was assigned to the office, the situation improved, but that after coworker 2 transferred to the office, the "low life treatment" started again. She indicated that she felt that nothing would be done about the sexual harassment problems in the Jacksonville office by management and that coworkers 1 and 2 would

continue to harass any female that was assigned to that office.

Coworkers 1 and 2 were not questioned regarding and did not specifically deny the particular incidents cited by appellant or the former Aviation Clerk. However, coworker 1 averred that he never intentionally did anything "with malice in his heart" that he felt would intentionally intimidate or offend appellant. Coworker 2 denied yelling at appellant or losing his temper with her, indicating that when he found out appellant was a "militant female," he avoided her. He asserted that appellant had a "foul mouth" and indicated that the worst language he could remember using was the words "dog---it."

The Assistant Manager averred that appellant first informed him that she was having a problem with coworker 1 and 2 on May 15, 1990. He indicated that he came to the facility and spoke with appellant and coworker 1. He indicated that it got to the point that he was getting ready to take disciplinary action against the men involved until he "found out that [appellant] was exaggerating the facts." He indicated that the previous Aviation Clerk had never complained to him regarding the same problem. The FAA Manager corroborated that the previous Aviation Clerk had complained to him about the alleged harassment, but indicated that he believed the situation had been settled between the parties.

A Secretary in the Flight Service Station at the Jacksonville facility (Secretary 1) indicated that appellant had come into her office on many occasions during her tenure sobbing and stating that "you don't know what goes on in my office." She indicated that appellant was upset over the offensive language that was used in her office and that appellant feared for her personal safety because she and coworker 1 did not get along. She stated that appellant told her that coworker 1 had a gun in his office. Finally, she averred that her supervisor had informed her that she did not have to give a statement supporting appellant's complaint if she did not want to do so. The EEO Investigator assigned to investigate appellant's complaint commented in the investigative report, in

pertinent part, that:

It is important to note at this time, that during the on site investigation, all of the employees, past and present, at the Jacksonville FSDO are intimidated by [the Assistant Manager]. When questioned by this investigator, they did not want to go on record for fear or (sic) reprisal from [the Assistant Manager].

Investigative Report, p. 10.

Appellant claimed that in retaliation for complaining to management about the claimed harassment, management officials denied her requests for continued leave after she left the work environment as of June 18, 1990, due to mental illness caused by the harassment. A July 17, 1990 letter from appellant's new supervisor³ denies appellant's request for administrative leave or excused absence after July 5, 1990, finding no justification for approval of appellant's request and insufficient medical documentation⁴ for the approval of sick leave. Appellant was informed that until adequate medical documentation was received, she would remain in an AWOL status which could result in disciplinary action up to and including her removal from the agency.⁵ The record also contains an October 30, 1990 letter from a Claims Examiner of the Office of Workers' Compensation Programs (OWCP) indicating that OWCP had accepted appellant's condition of "adjustment disorder with mixed emotional features" as employment related.

An October 15, 1990 letter from the Medical Director of a Mental Health and Substance Abuse care facility diagnosed appellant as suffering from an adjustment disorder with mixed emotional features, repeated appellant's allegations of sexual harassment, and indicated that appellant spoke at all times in a forthright manner about her symptoms and what led to their appearance. The physician offered his opinion that the events described by appellant are the cause of her condition. In an August 8, 1991 letter from the same physician, appellant's more recent diagnosis is offered as "major depression, single episode, without psychosis." The physician observed that appellant had been incapacitated by her depression since her initial

September 1990 consultation and that, while she had since improved, she was still not well enough to perform adequately in her previous job, or a similar one.

In her request for reconsideration, appellant asserts that the previous decision clearly omitted facts pertinent to and supportive of her complaint. She asserts that the coworker who brought the loaded weapon into the workplace (coworker 1) directed his aggressive hostility toward her which frightened her and made her feel physically threatened. She notes that while the previous decision indicated that the general work atmosphere was relevant in deciding if a hostile work environment existed, it failed to properly consider such evidence, including management admissions of previous problems between coworker 1 and other employees, the Manager's agreement that the inspectors in appellant's office needed a "baby-sitting" environment, and the previous Aviation Clerk's statement which identified harassing and hostile situations involving coworkers 1 and 2 during her tenure. She asserts that the incidents alleged were not personality conflicts as characterized by the previous decision, but were incidents of discriminatory harassing and hostile conduct by coworkers 1 and 2.

Appellant reasserts specifically that these individuals yelled at her, threw documents at her, instructed her to clean up after them, to bake cakes and to make their coffee, and downgraded women with comments of keeping them in their place and their being inferior to men. She reiterates her previous assertion that coworker 2 asked her if she was in menopause because of the cool room temperature. Appellant also asserts that the previous decision inaccurately indicated that all employees participated in inappropriate joke telling, when she did not. She points out that the June 20, 1990 letter from the Assistant Manager indicated that the Inspectors, not her, had been counseled regarding this practice. She claims that this conduct engendered an intimidating, offensive and hostile environment that affected her ability to do her job.

Appellant further asserts that the previous decision inaccurately characterized her predecessor's statement as being brief and limited when instead, the four page statement was explicitly detailed and cited sexual harassment and sex discrimination which validated her claim that the civil rights of female FAA employees were regularly violated. She further claims that the previous decision inaccurately limited her complaint to allegations of sexual harassment when she also alleged, *inter alia*, "sex harassment and sex discrimination." She indicates that the decision failed to consider that she has received Worker's Compensation and Social Security Disability benefits, and has been approved for disability retirement by the Office of Personnel Management.

Finally, appellant cites her letters to the agency on January 31, 1992 and September 29, 1992 in which she requested to file an EEO complaint of reprisal in her termination by the agency. She claims that, to date, no action has been taken by the agency on her complaint. Appellant further reasserts that she is entitled to compensatory damages for past, present and future pecuniary losses, medical disability and "other inconveniences."

The agency has not responded to appellant's request.

Analysis and Findings

After a careful review of the record, the Commission finds that appellant's request for reconsideration meets the regulatory criteria of 29 C.F.R. § 1614.407(c)(2). Accordingly, it is the decision of the Commission to grant appellant's request.

We reach this determination for several reasons which we shall delineate in detail below. First, we note that the previous decision analyzed appellant's allegations of discrimination solely as allegations of sexual harassment. While appellant frequently referred to her claims as allegations of sexual harassment, our review of the record herein indicates that the vast majority of the incidents described by both appellant and her predecessor, are not sexual in

nature, but are clearly allegations of sex-based harassment. In her request for reconsideration, appellant asserts that the previous decision improperly failed to consider her allegations of sex discrimination. Therefore, we will reconsider the previous decision in order to fully analyze appellant's allegations of sex-based harassment.

Sex-based harassment, that is, conduct directed at an employee because of gender, yet not of a sexual or prurient nature, may give rise to liability under Title VII of the Civil Rights Act. The harassing conduct---aggression, intimidation, or hostility of a physical or verbal nature---violates Title VII where it is sufficiently severe or pervasive and is gender-based, occurring merely because of an employee's gender. *See Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988); *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985) [85 FEOR 7035]; *Taylor v. Department of the Air Force*, EEOC Request No. 05920194 (July 8, 1992) [92 FEOR 3428]; *Jones v. Department of Defense*, EEOC Appeal No. 01902888 (November 28, 1990) [91 FEOR 1048], RTR denied, EEOC Request No. 05910252 (July 5, 1991) [91 FEOR 3491]; *EEOC Policy Guidance on Current Issues of Sexual Harassment* N-915-050, No. 137, at 107 (March 19, 1990) (discussing sex-based harassment.6

Harassment is sufficiently severe or pervasive when it unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment. *Id.* Thus, a complainant must show membership in a protected group, such as gender, and severe or pervasive harassing conduct that would not have occurred except for membership in the protected class. *See Andrews*, 895 F.2d at 1482-83; *Hall*, 842 F.2d at 1013-15; *McKinney v. Dole*, 765 F.2d at 1138-40; *Jones*, EEOC Appeal No. 01902888 at 10-11; *EEOC Policy Guidance on Current Issues of Sexual Harassment*, N-915-050, No. 137, at 90-107.

In order for harassment to be considered conduct in violation of Title VII, the conduct need not

seriously affect an employee's psychological well-being or lead the employee to suffer psychological injury. Rather, as stated in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the applicable standard provides that Title VII is violated when the work place is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment. This standard requires an objectively hostile or abusive environment, one that a reasonable person would find hostile or abusive. *See Harris v. Forklift Systems Inc.*, 114 S.Ct. 367, 371 (1993).

The severity of the alleged harassment must be determined from a totality of the evidence. One of the critical components in this type of claim, then, is the environment. Evidence of general work atmosphere, as well as incidents of specific hostility directed toward a complainant, is an important factor in analyzing such a claim. *Hall*, 842 F.2d at 1013-15; *Jones*, EEOC Appeal No. 01902888, at 11. As the Third Circuit noted, pervasive use of derogatory and insulting terms aimed at a protected group may serve as evidence of a hostile environment. *Andrews*, 895 F.2d at 1485.

An employer is liable for such harassment in a case such as this one when it knew or should have known about the harassing conduct, but failed to take the appropriate preventative or corrective action. *Hall*, 842 F.2d at 1013; *Taylor*, EEOC Request No. 05920194, at 6-7. In order to avoid liability, the remedial action taken by the agency must be prompt and reasonably calculated to end the harassment. *Id.* And, as we have previously observed:

What is appropriate remedial conduct will necessarily depend on the particular facts of the case---the severity and persistence of the harassment, and the effectiveness of any initial remedial steps.

Taylor, EEOC Request No. 05920194, at 6-7.

Based on the totality of the evidence, we conclude that appellant has proven, by a preponderance of the evidence, that she was subject to sex-based harassment, as a result of the conduct of

coworkers 1 and 2, and that the Assistant Manager knew of the harassment and clearly failed to take the appropriate remedial steps. Appellant has shown each of the requisite elements of her claim of harassment here. On the initial element, there is no dispute that appellant is a member of a protected group, based on her gender. Our review of the affidavit of the previous Aviation Clerk and of the statement incorporated therein, which cited numerous incidents of sex based harassment from the same individuals whom appellant alleges also harassed her in a similar manner convinces us that appellant was subjected to a gender-based hostile work environment.

The incidents described by this witness, while verbal, are severe in nature in that they were explicitly derogatory and demeaning to the witness in a manner clearly based upon her gender, *i.e.*, repeated references to her competency accompanied by references to women as "the lower species," directives to perform menial and subservient chores for the all male office, a threatening reference by coworker 1 to potential violent action against her in a proprietary manner in the statement that if she was "his wife," he would beat the "s---it out of her," questioning of the legitimacy of her role in remaining in the workplace after marriage in the query concerning why she "wasn't at home with some babies," and derogatory references to the qualifications of other female employees based upon their gender. When the witness evidenced her displeasure with the unrelieved harassment, she was questioned in a gender based demeaning fashion regarding whether she had "PMS." While the former Aviation Clerk's statement does reveal an interpersonal conflict between the witness and coworker 1, it is also apparent that any such conflict was a result of the alleged gender based harassment of the witness by that individual. The agency offers no specific rebuttal to any of the incidents clearly cited by this witness. Our review of this testimony indicates that it both establishes a general atmosphere of pervasive gender based harassment in the work environment prior to appellant's employment and enhances the credibility

of appellant's subsequent allegations of continuing severe and pervasive gender based harassment by the same individuals thereafter.

We further find that the specific incidents cited by appellant were sufficiently severe and pervasive to rise to the level of a hostile work environment. Our assessment is that the incidents cited by appellant were merely examples of the harassment which appellant averred she was subjected to sometimes several times a day from her male coworkers, beginning on the first day of her employment and continuing until she left the environment after June 18, 1990. Moreover, we find that the specific conduct cited by appellant is severe in character, in that it evidences derogatory and demeaning treatment of appellant based overtly on her gender. Specifically, appellant asserted that she was also given directives to perform menial and subservient chores for the all male office, and was similarly subjected to comments regarding the allegedly inferior nature of her gender, and to demeaning gender related inquiries concerning her reproductive system. Appellant also asserted that she was yelled at and treated rudely by her male colleagues, on occasion with physically threatening overtones, including the display of a loaded firearm in the workplace by the individual whom she viewed as her principal harasser.⁷

Appellant further alleged that the male Aviation Inspectors frequently told distasteful jokes in her presence and were amused by her discomfort. While the June 20, 1990 letter to appellant regarding, *inter alia*, this topic, stated that they all agreed that all parties had participated in joke telling, appellant asserts that she did not do so and correctly notes that the letter indicates that only the Inspectors were counseled individually on the subject. Appellant's assertion that coworkers 1 and 2 were amused by her discomfort at their jokes was corroborated in the Assistant Manager's notes concerning the situation. The general credibility of appellant's allegations is also enhanced by the testimony of Secretary 1, who corroborates that appellant came into her office on many occasions during her tenure sobbing and stating

that "you don't know what goes on in my office."⁸ She corroborated that appellant was upset over offensive language that was used in her office and that appellant feared for her personal safety because she and coworker 1 did not get along and he had brought a gun to work.

Based on the totality of the evidence discussed herein, we find both that appellant's allegations of sex-based harassment are credible and that they are sufficiently gender related, severe and pervasive to rise to the level of a hostile work environment.

Next, we must examine the agency's liability for the harassing conduct at issue. We have previously noted that an employer is liable for such harassment in a case such as this one when it knew or should have known about the harassing conduct, but failed to take the appropriate preventative or corrective action. *Hall*, 842 F.2d at 1013; *Taylor*, EEOC Request No. 05920194, at 6-7. In order to avoid liability, the remedial action taken by the agency must be prompt and reasonably calculated to end the harassment. *Id.*

In the case at hand, the record clearly indicates that appellant made the Assistant Manager and other agency officials aware of the harassment on numerous occasions. The record also indicates that the Assistant Manager claimed that he initially intended to take disciplinary action against the cited individuals but failed to do so because of his unelaborated opinion that appellant was "exaggerating" the situation. Nevertheless, the June 20, 1990 letter indicates that the Inspectors were individually counseled regarding the situation. Although appellant requested a temporary reassignment, no such reassignment was forthcoming and it was suggested that appellant, and not the alleged harassers, request a permanent transfer.

Most indicative of the lack of seriousness with which appellant's allegations were treated by agency management were her unrefuted assertions that when she complained about the harassment, she was told by the Assistant Manager that she should treat coworker 1 "like a child" and that it was agreed by the Manager and other agency officials at a meeting held to discuss

her allegations that coworkers 1 and 2 required a "babysitting" environment. Moreover, in response to appellant's allegations of harassment, a system was developed whereby appellant would, if she returned to work, be isolated from contact with all but one of her colleagues. Appellant is not far afield in her assessment that such treatment would, in effect, have ostracized her from the remainder of the office. After appellant left the work environment due to mental illness allegedly caused by the subject harassment, her extended leave requests were not honored, she was carried in an AWOL status and was apparently ultimately removed from agency employment. Clearly, such treatment would not appear indicative of sincere agency efforts at appropriate remedial action for the subject harassment.

In view of our finding herein that the agency failed to take appropriate remedial action, we will order that such a remedy be provided for the subject harassment. In this regard, while appellant indicates that she was ultimately removed based on agency retaliation for her decision to challenge the harassment, that matter has not been investigated as part of the present complaint and appellant has also indicated that she has filed a separate complaint with the agency concerning her removal. Thus, the remedy herein will not address appellant's allegedly discriminatory removal by the agency.⁹ We will order, however, that in the event that appellant is ultimately restored to her former position as a result of that complaint, appellant shall not be required to work in the same workplace unit with coworkers 1 and 2 or under the supervision of the Assistant Manager. The agency shall accomplish this by affording appellant an optional transfer to an equivalent position in another unit or if she declines such a transfer, by transferring coworkers 1 and 2 and/or the Assistant Manager. We will further order that the agency consider disciplinary action against coworkers 1 and 2, and provide both coworkers 1 and 2 and the Assistant Manager with training on their responsibilities pursuant to Title VII concerning the elimination of sex based harassment in the work

place.

Appellant shall receive reimbursement of all sick and/or annual leave taken as a direct result of the subject harassment. *See Donna Meagher v. AAFES*, EEOC Appeal Nos. 01923078 [93 FEOR 3255] and 01923706 (May 19, 1993). All mention of appellant's placement in an AWOL status due to her use of sick leave taken as a direct result of the harassment shall be expunged from agency records. The agency shall also post the notice provided below. Finally, we note that appellant has requested compensatory damages for the subject harassment. However, appellant left the work environment in June 1990, over a year before the enactment of the Civil Rights Act of 1991 on November 21, 1991 made such damages recoverable in this case.¹⁰

Conclusion

Thus, after a review of appellant's request to reconsider, the previous decision, and the entire record, the Commission finds that the appellant's request meets the criteria of 29 C.F.R. § 1614.407(c), and it is the decision of the Commission to GRANT the appellant's request. The agency's final decision and the decision in EEOC Appeal No. 01932927 (June 14, 1994) are REVERSED. The agency is directed to comply with the Commission's Order set forth below. There is no further right of administrative appeal on a decision of the Commission on this Request to Reconsider.

Order

The agency is ORDERED to take the following remedial actions:

(1) The agency is ORDERED to restore to appellant any sick or annual leave she was compelled to take in direct response to the hostile work environment caused by the sex based harassment. Appellant may have also taken sick or annual leave in avoidance of the hostile work environment, for which she should be reimbursed.

(2) The agency is ORDERED to take immediate steps to fully inform coworkers 1 and 2 on the current state of the law regarding employment discrimination,

especially discrimination based on sex based harassment and the goals behind the law requiring equal employment opportunities for all. The Commission also strongly urges the agency to consider disciplining coworkers 1 and 2 due to the open, pervasive, and severe nature of their harassing behavior.

(3) The agency is ORDERED to take immediate steps to fully inform the Assistant Manager on the current state of the law regarding employment discrimination, especially sex based harassment and the responsibilities of managers who supervise individuals engaging in unlawful harassment.

(4) In the event that appellant is ultimately restored to her former position as a result of her removal complaint, appellant shall not be required to work in the same workplace unit with coworkers 1 and 2 or under the supervision of the Assistant Manager. The agency shall accomplish this by affording appellant an optional transfer to an equivalent position in another unit or if she declines such a transfer, by transferring coworkers 1 and 2 and/or the Assistant Manager.

(5) The agency is directed to purge all agency records of references to appellant's placement in an AWOL status on July 17, 1990.

(6) If appellant has been represented by an attorney at any stage in this proceeding, the agency is ORDERED to pay reasonable attorneys fees involved in the processing of her EEO complaint.

(7) The agency is ORDERED to post the attached notice, as described below.

(8) Unless otherwise specified, the agency shall accomplish each of the above actions within thirty (30) days of the date this decision becomes final.

(9) The agency is further ORDERED to submit a report of compliance, as provided below. The report shall include supporting documentation of each element of corrective action, as set forth in this order.

Posting Order

The agency is ORDERED to post at the Federal

Aviation Authority Flight Standards Office, in Jacksonville, Florida, copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

Implementation of the Commission's Decision

[See K0595, FEOR p. I-401.]

Attorney's Fees

[See H1092, FEOR p. I-401.]

[See P0993, FEOR p. I-402 for Statement of Review Rights.]

[See Z1092, FEOR p. I-404 for Right to Request Counsel.]

1 The investigative record contains a June 20, 1990 letter to appellant from the FAA Manager apologizing to appellant for her possible perception of the comments as being "other than a joke." Investigative Report Exhibit 19.

2 Appellant elaborated concerning the allegations of harassment she raised to the EEO counselor and in her formal complaint in an April 29, 1991 13 page response, with numerous attachments, to specific agency questions posed to her by the Agency's Assistant Administrator for Civil Rights. This statement is included in the agency's correspondence file. Appellant has repeatedly requested that this statement be made a part of the investigative report. An attachment to this response which appellant claims, without rebuttal, is a copy of notes taken by the Assistant Manager concerning his

efforts to curtail the harassment corroborates appellant's assertion that coworkers 1 and 2 appeared to the Assistant Manager to be amused by appellant's discomfort from the alleged distasteful humor.

3 A July 2, 1990 letter to the EEO Counselor from the Assistant Manager, indicates that this individual was appointed to supervise the Jacksonville office as of that date.

4 A July 12, 1990 medical statement referenced in the letter, does not offer a diagnosis of appellant's condition. However, the record also contains a July 16, 1990 letter to this official from appellant in which appellant indicated that she was providing such a diagnosis. The subject July 15, 1990 medical statement offered a diagnosis of appellant's condition as Situational Anxiety-Depressive disorder and stated that a prognosis would be offered on August 3, 1990 by her physicians. There is no indication in the record that appellant's AWOL status was lifted by her supervisor in response to his receipt of this additional medical documentation.

5 In a January 31, 1992 letter to the agency's Assistant Administrator for Civil Rights, appellant indicated her intent to file an EEO complaint alleging that her September 21, 1991 removal from agency employment was an act of retaliation by the agency. She asserted that she was not made aware of her right to file an EEO complaint upon her removal from agency employment. In a September 29, 1992 letter to the same agency official, appellant references her earlier request, and states that the agency had informed her in a March 19, 1992 letter that her complaint had been transferred to a regional office for processing. She requests that the agency advise her concerning the present status of that complaint.

6 As the court in *Hall* wrote: Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances. 842 F.2d at 1014.

7 While we note that appellant's allegations of rudeness are generally denied by coworkers 1 and 2, we find that the record does not contain specific

denials of the particular gender based comments alleged by appellant or of the demeaning job duties foisted upon her. In reaching our determination regarding the relative credibility of appellant's allegations on these matters, we have also considered coworker 2's reference to appellant in his affidavit as a "militant female" to be evidence of gender bias.

8 In crediting this testimony, we are mindful of the agency investigator's assessment that witnesses were reluctant to give testimony to support appellant's allegations because of a fear of retaliation from, notably, the Assistant Manager.

9 The agency is advised, however, that it should immediately commence processing this complaint in an expeditious manner, if it has not already done so.

10 The Commission notes the recent decision of the United States Supreme Court in *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), which held that the compensatory damages provision of the Civil Rights Act of 1991 was not to be retroactively applied to pre-Act conduct and would preclude an award of compensatory damages for any acts of alleged discrimination that occurred prior to November 21, 1991. In keeping with the *Landgraf* decision, the Commission will not seek compensatory damages for any violation involving pre-Act conduct. Accordingly, we find that appellant is not entitled to compensatory damages for discriminatory agency actions which occurred prior to November 21, 1991. See *Laverdure v. Department of the Interior*, EEOC Request No. 05931186 (June 14, 1994) [95 FEOR 3128].